Supreme Court, U. S.
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80-390

NO.____

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

SUSAN T. SMITH,

Petitioner

vs.

E. H. DAWS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT. (COURT OF APPEALS NUMBER 79-1581)

GROVER M. MOSCOWITZ,
ESQUIRE
Penthouse 702
9300 South Dadeland Boulevard
Miami, Florida 33156
(305) 661-3334

August, 1980

QUESTIONS PRESENTED

1. DOES PETITIONER, A PREFERENCE ELIGIBLE EMPLOYEE, HAVE THE RIGHT TO JUDICIAL REVIEW OF AN ADVERSE ARBITRATION AWARD?

2. WOULD A SUBSEQUENT POLICY CHANGE BY THE CIVIL SERVICE COMMISSION (MERIT SYSTEM PROTECTION BOARD) AFFECTING EXCESSIVE APPROVED ABSENCES INURE TO THE BENEFIT OF PETITIONER?

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OCTOBER TERM, 1980

SUSAN T. SMITH,

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vs.

E. H. DAWS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT. (COURT OF APPEALS NUMBER 79-1581)

OPINIONS BELOW

On November 20, 1978, The District Court of the Southern District of Florida entered an Order and Final Judgment affirming the arbitrator's decision as final and binding and confirming Summary Judgment for the Defendant on the ground that the Court was without jurisdiction.

On April 4, 1980, the U.S. Court of Appeals for the Fifth Circuit affirmed the decision of the District Court of the Southern District of Florida. The opinion of the Court of Appeals is reported at page 4426. On May 27, 1980, Petitioner's application for rehearing was denied. A copy of the Order denying this application is attached hereto as Exhibit "A" of Appendix.

JURISDICTION

This petition seeks review of a judgment dated April 4, 1980. A Petition for rehearing was filed by petitioner. This Petition was denied on May 27, 1980.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved due process of law as provided by the Fourteenth and Fifth Amendments to the Constitution of the United States and Section 301 of the Labor Management Relations Act (29 U.S.C. 185 (A)). The Fourteenth Amendment of the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection or the laws.

The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 United States Code §185 provides:

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner, (Appellant below) a distribution clerk with 9 years service in the Postal Service, was given removal notice for unsatisfactory attendance effective October 19, 1976. Petitioner filed a grievance and for an arbitration hearing pursuant to the National Agreement between the United States Postal Service and the union. The grievance was denied by the Postal Service and the arbitrator after hearing entered an opinion and award on May 9, 1977 affirming the denial.

On November 14, 1977 the Petitioner filed suit in the United States District Court, Southern District of Florida under 39 U.S.C. 1208(b) naming the Postmaster of Miami, Florida, as Defendant. Essentially, the Petitioner's complaint alleged that her discharge was contrary to the National Agreement, ie. the contract between the United States Postal Service and the union, in that her alleged unsatisfactory absences were authorized by the employer and therefore not good cause for dismissal.

Respondent filed a Motion to Dismiss the Complaint alleging that the arbitration award was final and binding; that there was just cause for termination due to unsatisfactory attendance; that there was no allegation that the union representation was improper and there was no motion to vacate or modify the award filed.

The Court denied the Motion and the Respondent filed an answer alleging lack of jurisdiction; that the adverse award of the arbitration was final and binding pursuant to the terms of the contract; and that the action was barred by laches, among other things, but admitted that administrative approval of the use of sick leave was granted for absenteeism due to illness.

In June of 1978 the Respondent filed a Motion for Summary Judgment and a memorandum in support thereof stated that the Complaint was not timely filed; that it failed to allege breach of duty by the union; that the Court lacked jurisdiction in that the grievance-arbitration procedure was the exclusive remedy and that determination, pursuant to the National Agreement procedure, was final and binding.

Thereafter, on November 20, 1978, the District Court entered an Order and Final Judgment affirming the arbitrator's decision as final and binding and confirming Summary Judgment for the Respondent on the ground that the Court was without jurisdiction.

The Petitioner filed a Motion to appeal in Forma Pauperis that was denied by the District Court on January 22, 1979.

On August 14, 1979, Petitioner noticed his appeal in The United States Court of Appeals for the Fifth Circuit. In an opinion dated April 4, 1980, the Court of Appeals affirmed the decision of the District Court. Petitioner filed a timely petition for rehearing before the Original Panel. This application was denied on May 27, 1980.

B. Statement of Facts

The Petitioner (Appellant below) was a preference eligible employee of the Postal Service, having served as a Distribution Clerk for some 9 years prior to her removal for unsatisfactory attendance effective October 19, 1976.

The Petitioner went through the grievance-arbitration procedures and was effectively terminated by final and binding arbitration Order and Award of May 9, 1977.

Petitioner's work history was found to be excellent. T-35. She missed work because of various sicknesses, including phlebitis. Her absences were in part attributable to a work connected injury to her leg. ROP-pages 222-223. Petitioner's absences began in February 1975. These absences were administratively approved. T-33. The Petitioner was working regularly and on the date of her removal, October 19, 1976. ROP-page 225.

ARGUMENT

ISSUE NO. 1

DOES PETITIONER, A PREFERENCE ELIGIBLE EMPLOYEE OF THE POSTAL SERVICE, HAVE THE RIGHT TO JUDICIAL REVIEW OF AN ADVERSE ARBITRATION AWARD?

The Petitioner, a preference eligible employee, ie. a permanent employee, one who has completed a probationary or trial period as an employee of a federal

government executive agency, must exhaust all administrative remedies pursuant to any collective bargaining contract before seeking judicial review. *Vaca v. Sipes,* 386 U.S. 171. Petitioner submits that the grievance-arbitration procedure under the National Agreement constituted exhaustion of her administrative remedy, and culminated in the adverse Order and Award of the Arbitrator of May 9, 1977. Therefore, all contractural remedies available to Petitioner having been exhausted, the Petitioner under Section 301 of the Labor Management Relations Act (29 U.S.C. 185(A)) had the personal right to seek judicial relief through the Court system. *Smith v. Evening News Association,* 371 U.S. 195, 83 S.Ct. 267.

An employee should not be bound by the failure of the union to pursue a judicial remedy so long as the union has finalized the administrative route in accordance with its bargaining agreement with the employer.

The District Court has inherent jurisdiction to review an administrative decision of a government agency involving personal and property rights to determine whether the employee was afforded procedural due process and whether the ultimate action of the agency was arbitrary or capricious.

Assuming, arguendo, that the Court has jurisdiction, the scope of review of administrative decisions is limited basically to two issues: (1) whether the procedural requirements of the statutes have been complied with; and (2) whether the action of the agency officials was arbitrary or capricious or not supported by substantial evidence. *Vigil v. Post Office Dept.*, 406 F.2d 921 (10th Cir. 1969); *Benson v. United States*, 421 F.2d 515 (9th Cir. 1970), cert. denied, 398 U.S. 943 (1970); *O'Leary v. Macy*, 294 F.2d 434 (D.C. Cir. 1961), cert. denied, 370 U.S. 953 (1962); *McTiernan v. Gronouski*, 377 F.2d 31 (2nd Cir. 1964); *Hargett v. Summerfield*, 343 F.2d 29 (D.C. Cir. 1957); cert. denied, 353 U.S. 970 (1975).

In *Hargett v. Summerfield*, supra, the Court noted that the policy of restricting the role played by the courts in review of employee removal cases was necessary to preserve the autonomy of an agency in dealing with disciplinary matters. Specifically, the Court at page 32 stated:

> "These cases and others (citations omitted) of similar import, decided both before and after the passage of the Administrative Procedure Act in 1946, make it clear that employee removal and discipline are almost entirely matters of executive agency discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. This has resulted in an unbroken line of authorities holding that, so long as there was

substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion." (citations omitted).

Therefore, if there has been substantial compliance with the appropriate regulations and statutes the courts will generally refrain from reviewing the merits of the case or upsetting administrative proceedings. *Seebach v. Cullen,* 338 F.2d 663 (9th Cir. 1964), cert. denied, 380 U.S. 972 (1965); *Jarrett v. Reasor,* 426 F.2d 213 (9th Cir. 1970). See also *Chiriaco v. United States,* 235 F.Supp. 850 (N.D. Ala. 1963), affirmed 339 F.2d 588 (5th Cir. 1964); *Rubin v. United States,* 150 Ct.Cl. 28 (1960); *Chiaverini v. United States,* 157 Ct.Cl. 371 (1962).

Although, the union urged the Arbitrator to consider that Petitioner's absences were approved by management, the Arbitrator decided the contention to be without merit. T-78. In effect the Arbitrator found that approved absences upon which the removal was predicated was just cause.

To envelop an unsuspecting employee in an adverse action founded on management's approved absences is tantamount to entrapment non pareil.

Notwithstanding the rule enunciated by the Arbitrator, with which the Petitioner agrees, to the effect that the employer has the right to expect acceptable levels of attendance, an adverse decision based on approved excessive absences is arbitrary and capricious and contrary to law. Therefore, the District

Court had ample grounds to assume jurisdiction. *McClendon v. Blount*, 452 F.2d 381.

In *Gernand v. United States*, 1969, 412 F.2d 1190, 188 Ct.Cl. 544, certiorari denied 94 S.Ct. 105, 414 U.S. 844, 39 L.Ed.2d 65, rehearing denied 94 S.Ct. 382, 414 U.S. 1017, 38 L.Ed.2d 253, the Supreme Court held that failure to appeal within 10 days after effective date of an adverse action decision as provided by regulation was not in itself a jurisdictional bar on question of timeliness of appeal.

The Supreme Court held delay of over 27 months which resulted in substantial prejudice to a government agency (TVA) constituted laches which barred the action. *Baskin v. Tennessee Valley Authority*, D.C. Tenn. 1974, 382 F.Supp. 641, affirmed 519 F.2d 1402.

Laches should not attach where the time of filing is reasonable and the Petitioner is not continuously represented by counsel as is the case here.

The District Court should have taken jurisdiction and granted the Petitioner relief in that the arbitrator misconstructed the rule applicable to the evidence presented.

ISSUE NO. 2

WOULD A POLICY CHANGE BY THE CIVIL SERVICE COMMISSION (MERIT SYSTEM PROTECTION BOARD) AFFECTING EXCESSIVE APPROVED ABSENCES INURE TO THE BENEFIT OF THE APPELLANT?

The adverse action against the Petitioner based on unsatisfactory attendance began with the notice of removal sent by the Postal Service on September 17, 1976. The arbitration Award of May 9th, 1977 resulted in Petitioner's grievance being denied. The Civil Service Commission in April 1978 altered its policy and decided that an adverse action based on a record of approved leave is not such cause as would promote the efficiency of the service. Memorandum, dated April 13, 1978, Senior Assistant Postmaster General, Employee and

Labor Relations Group, Subject: Discipline for Excessive Absence.

Since the principal upon which the arbitrator made his decision has changed it would be unfair to adjudicate this case under the old rule.

The evidence of the Petitioner's absences for illness was substantially proven at the hearing and the approval of said absences by management was admitted. ROP-page 210.

The Petitioner was working at the time of her removal. ROP-page 225. The fact that she had worked for nearly nine years and was considered an excellent employee augurs well for her ability to return to productive employment with the Postal Service.

The Petitioner urges the Court to consider the changed policy of the Civil Service Commission and to adjudicate her rights on that basis. To deny the Petitioner the opportunity for reconsideration would be inequitable and against the dictates of justice. MERIT SYSTEMS PROTECTION BOARD, **DECISION,** (*IN THE MATTER OF Francis A. Kibort*), dated June 29, 1979.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been served upon opposing counsel, ATLEE W. WAMPLER, U.S. ATTORNEY, 155 South Miami Avenue, Suite 700, Miami, Florida by U.S. Mail, postage prepaid, this 25th day of August, 1980.

GROVER M. MOSCOWITZ,
ESQUIRE
Penthouse— 702
9300 South Dadeland Boulevard
Miami, Florida 33156
(305) 661-3334

BY: Grover M. Moscowitz
GROVER M. MOSCOWITZ

APPENDIX

EXHIBIT "A"

FILED MAY 27 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1581

SUSAN T. SMITH,
Plaintiff-Appellant,

versus

E. H. DAWS, as Postmaster,
United States Postal Service, Miami, Florida,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

(May 27, 1980)

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

[Illegible]

United States Circuit Judge

80-390

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

NO.____

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

SUSAN T. SMITH,

Petitioner

vs.

E. H. DAWS, AS POSTMASTER
United States Postal Service
Miami, Fla.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GROVER M. MOSCOWITZ,
ESQUIRE
Penthouse 702
9300 South Dadeland Boulevard
Miami, Florida 33156
(305) 661-3334

August , 1980

NO. ____

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Supreme Court

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OCTOBER TERM, 1980

SUSAN T. SMITH,

Petitioner

vs.

E. H. DAWS, AS POSTMASTER
United States Postal Service
Miami, Fla.

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EXHIBIT "A"

FILED MAY 27 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1581

SUSAN T. SMITH,
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E. H. DAWS, as Postmaster,
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Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

(May 27, 1980)

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

[Illegible]

United States Circuit Judge

SMITH v. DAWS

EXHIBIT "B"

Susan T. SMITH,
Plaintiff-Appellant,

v.

E. H. DAWS, as Postmaster,
United States Postal Service,
Miami, Florida,
Defendant-Appellee.

No. 79-1581
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 4, 1980.

The United States District Court for the Southern District of Florida, Jose A. Gonzales, Jr., J., rendered summary judgment dismissing former postal service employee's suit for wrongful discharge, and she appealed. The Court of Appeals, Tate, Circuit Judge, held that having availed herself of grievance-review procedure of collective bargaining agreement between

*Fed.R.App.P. 34(a); 5th Cir.R. 18.

postal service and her union, postal service employee, who failed to establish that she was a "preference eligible" employee, was likewise subject to contract provision that arbitrator's decision was final and binding; thus, under Postal Reorganization Act, employee was not entitled to judicial review of arbitrator's adverse determination absent claim of inadequate union representation.

Affirmed.

Labor Relations — 465

Having availed herself of grievance-review procedure of collective bargaining agreement between postal service and her union, postal service employee, who failed to establish that she was a "preference eligible" employee, was likewise subject to contract provision that arbitrator's decision was final and binding; thus, under Postal Reorganization Act, employee was not entitled to judicial review of arbitrator's adverse determination absent claim of inadequate union representation. 39 U.S.C.A. §§1005(a), (a)(1,2), 1208(b).

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, KRAVITCH and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiff-appellant appeals from summary judgment dismissing her suit for wrongful discharge as a

postal employee. Her complaint was founded on 39 U.S.C. Section 1208(b), which authorizes suit in federal district court for breach of contract between the Postal Service and a labor organization representing its employees. The district court held that the decision of the arbitrator, pursuant to grievance procedures, was final and binding under terms of the collective-bargaining agreement and therefore barred judicial review.[1]

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[1]We do not interpret the district court's reasons in its order granting summary judgment as holding that it had no jurisdiction to entertain this litigation. The essential holding was that there was no genuine issue of law or fact because the arbitrator's decision was final and binding. Although the reasons also included the phrase that the court was "without jurisdiction", we do not infer that the court meant other than that the court's re-determination of the merits of the arbitrator's decision was barred. As stated in *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 418 (5th Cir. 1966): "The fact of the matter here is that the union processed appellant's grievance up to the point of striking. The denial of his claim then became final. We believe the law to be that his claim was thereby barred. *The court has jurisdiction.* [Citation omitted.] The action under the grievance procedure, here a final decision under the terms of the agreement, may *be asserted in bar as an affirmative defense.* That is this case, and thus it must be affirmed." (Italics ours.) *Haynes* was one of the principal authorities relied upon by the district court, and it expressly rejected the employer's requested response to the question, "Are the processes of the court now available to him for contesting or avoiding that final [arbitrator's] decision?". In its summary of judicial holdings, the court stated: "The doors of the court were open but the claim was barred." 362 F.2d 418. Neither the reasons of the district court nor the arguments by the appellee suggest a holding contrary to these expressions in *Haynes,* which was expressly relied upon by the district court.

We affirm the district court decision. However, unlike the district court, we base our affirmance upon section 1005(a) of the Postal Reorganization Act, which provides that (with here-inapplicable exceptions) adverse actions against postal employees are regulated by a collective-bargaining agreement.[2] (The district court based its holding primarily upon jurisprudential interpretations and applications of section 203 of the Labor-Management Act, 29 U.S.C. section 173, which enunciates principles for adjustment of disputes between an employer and an employee in private industry.)

Context facts

The plaintiff-employee Smith, age 49, had been employed by the Postal Service for nearly nine years,

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[2]39 U.S.C. section 1005 pertinently provides:

"(a)(1) Except as otherwise provided in this subsection, the provisions of chapter 75 of title 5 [5 U.S.C. sections 7501 et seq., providing for administrative review of adverse actions relating to removal, suspension, reduction, etc. of civil service employees] shall apply to officers and employees of the Postal Service *except to the extent of any inconsistency with*

(A) the provisions of any collective-bargaining agreement negotiated on behalf of and applicable to them; or

(B) procedures established by the Postal Service and approved by the Civil Service Commission.

"(2) The provisions of title 5 relating to a preference eligible (*as that term is defined under section 2108(3) of such title*) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title. The provisions of this paragraph shall not be modified by any program developed under section 1004 of this title or any collective-bargaining agreement entered into under chapter 12 of this title." (Italics ours.)

from early 1968 until her discharge in October, 1976. The arbitrator's report shows an excellent work record, except for periods of absence in the last year of her employment. During that year, because of illness, she had requested and *been approved for* 67 days of sick leave. The arbitrator held that, under then applicable Postal Service Manual regulations, the employee Smith's discharge for excessive absenteeism was for "just cause," even though these absences had been administratively approved as justified.

In filing this present suit based on a breach of the bargaining contract, 39 U.S.C. Section 1208(b),[3] the plaintiff-employee contends that her discharge for such reason was a breach of the collective-bargaining agreement — particularly Article X (Providing for vacation and sick leave) and Article XIX (which provides that the Postal Service Manual regulations shall contain nothing to conflict with the contract with regard to employees' working conditions).

On appeal, she contends that the arbitrator's decision is reviewable as arbitrary and capricious. She also points out that, within a year after the arbitrator had affirmed her discharge in May, 1977, the Postal

[3]39 U.S.C. Section 1208(b): "Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy."

Service itself issued instructions that adverse disciplinary action should not be taken for excessive *approved* absenteeism.[4]

Issues

The plaintiff asks us to determine whether the arbitrator's decision was so erroneous that it was arbitrary and capricious. However, we do not reach this question until other issues are first resolved, including: 1) whether (as the district court held) *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), and *Haynes v. U.S. Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966), require us to hold that the arbitrator's decision was final and binding and could not be relitigated; 2) whether, if not, a similar holding is required by other legislative provision or jurisprudential precepts; and 3) in the event that plaintiff's claim is not barred, whether proof that the arbitrator's decision was erroneous will suffice as a basis for a breach of contract claim.

Ultimately, we do not consider the question of the arbitrariness of the arbitrator's decision, for the resolution of these preliminary issues convinces us that the district court correctly decided that, upon the present allegations and showing, the contract-provided finality of the arbitrator's finding bars judicial review of its alleged erroneousness.

I. *Hines-Haynes rationale and its present application*

[4]Memorandum, April 13, 1978, "Discipline for Excessive Absence," Senior Assistant Postmaster General, Employee and Labor Relations Group.

The plaintiff Smith and her union had filed a grievance concerning her discharge and had proceeded to arbitration under the terms of the collective-bargaining agreement between the union and the Postal Service. The agreement provides that the arbitrator's decision "will be final and binding."

The district court held that the contract-provided finality of the discharge-grievance arbitration barred judicial review of its correctness on a 1208(b) claim (founded on breach of the union contract), absent any claim of inadequate union representation (and none is alleged here). The district court holding was essentially based upon two decisions that recognized this principle. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966).

These decisions concerned suits by employees of private industry to enforce collective-bargaining contracts. They were based upon section 301(a) of the Labor-Management Relations Act, 29 U.S.C. Section 185(a).[5] This statute is substantially identical to section 1208(b) of the Postal Reorganization Act, see note 3, *supra*, the jurisdictional statute upon which the present suit is based. The decisions were reached in effectuation

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[5]29 U.S.C. Section 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

of the policy expressly provided by section 203 of the Labor-Management Act, 29 U.S.C. Section 173(d): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

We agree with the plaintiff-appellant that the cited *Hines* and *Haynes* decisions are not necessarily determinative of the present issue.

With regard to issues of federal jurisdiction in suits for violation of collective-bargaining agreements and procedural incidents thereto, the virtually identical language and similar purpose of Labor-Management's section 301(a) and Postal Reorganization's section 1208(b), see notes 3 & 5, *supra*, do indeed permit the judicial gloss acquired by the longer-enacted Labor-Management section 301(a) to serve as an interpretive guide to the subsequent postal section 1208(b).[6] However, in the absence of similar substantive provisions applicable to suits under either statute, we see no reason why judicial interpretations of Labor-Management suits should necessarily be applicable to suits under the Postal Service provisions, at least when a

[6] *National Association of Letter Carriers v. U.S. Postal Service*, 192 U.S.App.D.C. 55, 590 F.2d 1171 (D.C. Cir. 1978) (whether and under what criteria attorney's fees awardable); *National Association of Letter Carriers v. Sombrotto*, 449 F.2d 915 (2d Cir. 1971) (jurisdiction for suit by parent international against local for violation of labor "contract," i.e., national constitution); *American Postal Workers Union v. U.S. Postal Service*, 356 F.Supp. 335 (E.D. Texas, 1972) (is past practice over coffee breaks a "contract" so as to confer jurisdiction on federal district court under 1208 for violation thereof?).

suit by a postal employee concerns statutory or substantive regulations differing from those applicable to privately employed workers.

Section 203 of the Labor-Management Relations Act, 29 U.S.C. Section 173, is not among those provisions of that statute made applicable to postal workers, see 39 U.S.C. Section 1208(a). The *Hines-Haynes* rationale is thus not *necessarily* applicable to the present dispute, insofar as those decisions are based upon *Labor-Management section 203's* statutory intent that the correctness of a final settlement of a grievance dispute through the method agreed upon by the parties to a collective-bargaining contract should not ordinarily be reviewed by the courts.

II. *Judicial review of dismissal of postal worker pursuant to collective-bargaining arbitration procedure*

On the plaintiff-employee's appeal, her root argument is that she is a Civil Service employee with a statutorily-protected right to tenure, so that a judicial remedy is still available to her for her arbitrary discharge — notwithstanding the unfavorable result of the grievance and arbitration procedures to which she resorted. That is, she distinguishes herself from the privately-employed workmen in *Hines* and *Haynes*, where the employee's right to tenure was based solely upon the collective-bargaining contract.

We have noted that the *Hines-Haynes* rationale should not be mechanically applied to public employee-employer disputes, away from its original context as an

interpretation of the statutory policy of the enactment regulating labor-management relations in private industry. Nevertheless, we ultimately conclude that the result reached by the district court is correct, with our conclusion being based upon a rationale similar to that in *Hines-Haynes* but grounded upon a specific and different legislative provision statutorily applicable to this postal worker-employee dispute.

Applicable to the present issue is section 1005(a) of the Postal Reorganization Act, 39 U.S.C. Section 1005(a)(quoted in note 2, *supra*). This statutory section provides that the civil service enactment relating to review of adverse actions (including dismissals) shall apply to postal employees "*except* to the extent of any inconsistency with (A) the provisions of any collective-bargaining agreement negotiated on behalf of and applicable to them." (Italics ours.)

As noted earlier, the collective-bargaining agreement between the postal service and the union representing the plaintiff-employee Smith provides for grievance and arbitration procedures relating to disciplinary actions against postal employees. The contract likewise provides that the arbitrator's decision "will be final and binding". The import of the statutory regulation provided by section 1005(a) is that review of a dismissal of a postal employee shall be governed by the collective-bargaining contract, not upon statutes conferring rights of review to other civil-service employees.

Having availed herself of the grievance-review procedures of the collective-bargaining contract, the plaintiff-employee is likewise subject to the contract's

provision that the arbitrator's decision is final and binding. On its face, the quoted provisions of section 1005(a) do not authorize administrative or judicial review of the correctness of the arbitrator's findings and rationale.

III. *No breach of contract and therefore no ground for judicial relief shown*

The cause of action and jurisdictional basis of the plaintiff-employee's suit is that she was prejudiced by a violation of the collective-bargaining contract. 39 U.S.C. Section 1208(b).

As noted, the Postal Reorganization Act provides that the collective-bargaining agreement shall supersede inconsistent provisions of civil service statutes relative to adverse actions, including discharge, 39 U.S.C. Section 1005(a)(1)(A)(quoted in note 2, *supra*). Article XV of the contract here applicable provides for a four-step grievance procedure, following which the employee may request arbitration. Section 3 of this contract article also provides: "The arbitrator's decision will be final and binding." Thus, the plaintiff was accorded all rights to contest her discharge to which she was entitled under the collective-bargaining agreement.

Her essential complaint, however, is that the arbitrator committed error in finding that just cause for removal for excessive absenteeism could be based on administratively approved absences, a ruling then in accord with postal manual regulations. However, the arbitrator's mistake (if such it was), violated no contractual right (the sole basis for this suit), where the

plaintiff herself exercised her contractual right to arbitration — which correlatively included her acceptance of the arbitrative decision as final and binding. "The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake." *Hines, supra,* 424 U.S. at 571, 96 S.Ct. at 1059.

IV. *The employee Smith's supplementary contentions on appeal*

The plaintiff-employee argues on appeal additional reasons why the dismissal of her suit should be reversed or, at least, why there should be a remand for determination of the legality of her discharge in the light of a change in postal service disciplinary grounds occurring shortly after her employment was terminated. These additional arguments relate to (a) her contention that on the face of the pleadings and evidence she is a "preference eligible" employee who cannot statutorily be deprived of her civil-service rights of review and (b) her showing of a clarification of postal employee regulation, indicating that her discharge was illegal.

a) *The plaintiff as a "preference eligible" employee statutorily excepted from effects of collective-bargaining agreement?*

The plaintiff Smith argues that she is statutorily excepted from the loss of her right of review by the terms of a collective-bargaining agreement. Most favorably to the plaintiff-employee, her contentions may be stated as follows:

She is an employee of the postal career service, part of the federal civil service. 39 U.S.C. Section 1001(b). The provisions of a postal workers collective-bargaining agreement may indeed prevail if inconsistent with statutory provisions regulating the discharge of civil service employees. 39 U.S.C. Section 1005(a)(1) (quoted in note 2, *supra*).

Nevertheless, she argues she is a "preference eligible" employee and that therefore her statutory rights as a civil service employee, including appeal of a wrongful discharge to the Civil Service Commission (now the Merit Systems Protection Board), could not be affected by a collective-bargaining agreement. 39 U.S.C. Section 1005(a)(2) (quoted in note 2, *supra*).[7] Therefore, her exhaustion of her grievance-arbitration rights under the collective-bargaining agreement, a necessary pre-requisite to seeking judicial remedy, *Vaca v. Sipes*, 386 U.S. 171, 184-85, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967), should

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[7]At the time of the plaintiff's discharge, a "preference eligible employee," *as then defined by 5 U.S.C. Section 7511* ("a permanent or indefinite *preference eligible* who has completed a probationary or trial period as an employee"), was statutorily entitled to an appeal to the Civil Service Commission from adverse administration action. 5 U.S.C. Section 7701. For present purposes, we accept the plaintiff's argument that judicial review would be available for an arbitrary administrative determination supporting the discharge of a preference eligible employee. See, e.g., Annotation, 25 A.L.R.Fed. 443, 456-58 (1975); *Dozier v. United States*, 473 F.2d 866 (5th Cir. 1973); *Vigil v. Post Office Department*, 406 F.2d 921 (10th Cir. 1969).

However, it should be noted that the term *"preference eligible* employee" is a term referring to an employee who is a "preference eligible," a term which is defined by another statute (see note 9, *infra*). See Annotation, 25 A.L.R.Fed. 443, 445-46, n.2 (1975).

not bar judicial review of an arbitrary discharge for *approved* absences in violation of her contractual rights (including her right to sick leave). The essence of plaintiff's argument is that she is a preference eligible rather than just an ordinary postal employee and that therefore her right to appeal has been preserved.

However, neither the pleadings nor the evidence show that the plaintiff-appellant is a "preference eligible" within the meaning of 39 U.S.C. Section 1005(a)(2), so as to confer upon her appellate rights in excess of those recognized by the union contract — even accepting the plaintiff's construction that, if she is a "preference eligible," the statutory section prohibits the collective-bargaining agreement from depriving her of any appellate rights she had in such category.[8] The prohibition of section 1005(a)(2), if it is such, expressly applies only to "a preference eligible (*as that term is defined under* [5 U.S.C.] *section 2108(3)* * * *)," a definition restricted to preference rights given veterans and some members of their families.[9] Neither the pleadings, the evidence, nor any contention in brief indicate that the plaintiff-appellant is within the

[8]Under Article XVI, section 6, of the collective-bargaining contract a preference eligible employee is not deprived of rights of appeal under the Veterans Preference Act; but, if he so appeals, he waives any right to the grievance-arbitration procedure provided by the contract. The plaintiff employee would argue that the contract does not provide the converse — i.e., that resort to the grievance arbitration procedure waives her statute-mandated right to appellate review.

[9]5 U.S.C. Section 2108(3)'s definition of "preference eligibles," originally enacted as part of the Veterans Preference Act, affords preference eligibility to veterans, their unmarried widows or widowers, or (in limited circumstances) their spouses or mothers.

category of "preference eligible" employees as thus statutorily excepted from relegation to collective-bargaining rather than civil-service disciplinary review rights.[10] Her argument that she is within this statutory exception therefore fails.

b) *Remand in the light of change in postal employee regulations?*

The plaintiff likewise urges remand for reconsideration in the light of a change in postal employment policy soon after her discharge. In 1976, she was fired from her position as distributor clerk at the Miami post office for excessive (although administratively-approved) absenteeism. Within a year of the arbitrator's decision, the Postal Service no longer permitted *approved* absence to be considered disciplinary cause (see note 4, *supra*).

Likewise (as the agency decision below cited states), a distributor clerk (Kibort) at the same post office was discharged in 1973 (prior to plaintiff's discharge) for the same cause as the plaintiff. However, Kibort possessed or exercised administrative civil service appeal rights, and his discharge was ultimately

[10]The appellant's brief, p. 4, refers to a preference eligible employee as a permanent employee who has completed a probationary or trial period as an employee of a federal agency, apparently assuming from the definition of 5 U.S.C. Section 7511 (see note 7, *supra*) that the Postal Reorganization Act's section 1005(a)(2) referred to appellate rights of all permanent employees rather than only (see note 9, *supra*) to those classified by the Veterans Preference Act as "preference eligibles."

held to be contrary to civil service regulations.[11] *In the Matter of Francis A. Kibort,* decision of the Merit Systems Protection Board, June 29, 1979.

We are not unsympathetic to the plaintiff's complaint that she, a civil service employee, received disparate if not inequitable treatment as a result of her resort to the grievance-arbitration procedure provided by the collective-bargaining agreement. Ultimately, however, her present suit — based solely upon a breach of a collective-bargaining agreement, 39 U.S.C. Section 1208(b) — must fall because no such breach is shown and she herself requested arbitration with its contract-provided conclusiveness.

AFFIRMED.

[11]The specific civil service regulation offended was CFR 752.104 (1976), providing for no adverse action against an employee except for such cause as promotes the efficiency of the service, as supplemented by the interpretative guidelines provided by Federal Personnel Manual Supplement 752-1, by which a "cause" for disciplinary offense was defined as "a recognizable offense against the employer-employee relationship." Therefore, the agency's approval of an employee's request for leave, thereby releasing him/her from an obligation to report for duty, prevents the agency from considering the absence to be a breach of the employer-employee relationship.

EXHIBIT "C"

NOV 20 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-5456-CIV-JAG

SUSAN T. SMITH,

Plaintiff,

vs.

E. H. DAWS, etc.,

Defendant.

Plaintiff brought this suit for wrongful discharge in violation of collective bargaining agreement pursuant to 39 USC 1208(b). Plaintiff was discharged for excessive absenteeism. She alleges that all absent hours were because of illness and were approved absences and, in light of excellent employment record, she should not have been discharged. Plaintiff filed a grievance which proceeded through administrative steps as provided for in the collective bargaining agreement and the case went to an arbitrator per the agreement. The arbitrator, whose judgment was final and binding pursuant to Article XV §3 of the agreement, held a full evidentiary hearing and issued an opinion finding that Plaintiff's

grievance was timely filed, but that there was just cause of termination. Six months later, Plaintiff filed this action. Plaintiff appears to agree with the statement of facts as set forth in Defendant's Motion for Summary Judgment. Therefore the only remaining issue for the Court's determination is whether Defendant is entitled to judgment under the law. The main basis for Defendant's motion is that the arbitration was final and binding and therefore this Court is without jurisdiction.

Section §208 of Title 39, United States Code effectively mirrors the language of §301 of the Labor Management Relations Act (29 USC 185) and cases under §301 are controlling in 1208 suits. *See Nat'l Assoc. of Letter Carriers v. Sombrotto,* 449 F.2d 915 (2nd Cir. 1971) *Am. Postal Workers Union v. U.S. Postal Service,* 356 F. Supp 335 (E.D. Tex 1972).

In *Haynes v. U.S. Pipe & Foundry Co.,* 362 F.2d 414 (5th Cir. 1966), an employee brought a 301 suit for wrongful discharge. The Fifth Circuit affirmed dismissal of the action on the grounds that the employee had proceeded through grievance procedures and the decision rendered thereby was final under the terms of the agreement. The dissatisfied employee was thereafter barred from contesting the decision in the Courts.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) was also a wrongful discharge case brought under §301 alleging breach of a collective bargaining agreement. Employees discharged for dishonesty proceeded through an arbitration committee whose decision was final and binding under the collective bargaining agreement. The committee upheld the

discharges but subsequent information revealed that the charges were false. The employees then instituted a §301 suit against the employer and against the union for breach of the duty of fair representation. The Supreme Court held that the employees were not entitled to relitigate their discharge merely because of the newly discovered evidence that the charges against them were in fact false. "Final adjustments by a method agreed upon by the parties is declared to be the desireable method of settlement of grievance disputes." 29 USC 173(d) "This congressional policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play" *Hines* at 562. "Courts are not to usurp those functions which collective bargaining contracts have properly entrusted to the arbitration tribunal." *Id* at 563. The Court in *Hines* went on to hold that enforcement of the finality provision is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings. There is no allegations in Plaintiff's complaint that the union failed to fairly represent her during the arbitration and from the findings of the arbitrator, it appears that the union was zealous in its representation.

Accordingly, it is

ORDERED AND ADJUDGED that there being no genuine issues of material fact, and it appearing that the decision of the arbitrator was final and binding, Defendant's Motion for Summary Judgment is granted as this Court is without jurisdiction and judgment shall be entered accordingly.

DONE AND ORDERED this 20th day of November, 1978.

JOSE A. GONZALEZ, JR.

U. S. DISTRICT JUDGE

Copies furnished:

N. J. Foley
United States Attorney

"EXHIBIT "D"

NOV 2 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SUSAN T. SMITH,

Plaintiff,

vs

E. H. DAWS, etc.,

Defendant.

FINAL JUDGMENT

THIS CAUSE having come before the Court on Defendant's Motion for Summary Judgment and the Court having considered the motion and memoranda and having entered an Order granting Defendant's Motion, it is thereupon

ORDERED AND ADJUDGED that Plaintiff, Susan T. Smith, take nothing, and judgment be entered in favor of Defendant, E. H. Daws, Defendant-Daws to recover his costs from Plaintiff-Smith.

DONE AND ORDERED this 20th day of November, 1978.

JOSE A GONZALEZ JR.

U. S. DISTRICT JUDGE

Copies furnished:

W. J. Foley
United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing writ of certiorari have been served upon THE SOLICITOR GENERAL, Room 5614, Department of Justice, Washington, D.C. 20530, by U.S. Mail, postage prepaid, this 8th day of Sept, 1980.

GROVER M. MOSCOWITZ,
ESQUIRE
Penthouse — 702
9300 South Dadeland Boulevard
Miami, Florida 33156
(305) 661-3334

BY: Grover M Moscowitz
GROVER M. MOSCOWITZ

Supreme Court, U. S.
FILED
OCT 31 1980
JR., CLERK

No. 80-390

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUSAN T. SMITH, PETITIONER

v.

E.H. DAWS, POSTMASTER, UNITED STATES POSTAL SERVICE, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

After petitioner was discharged by the United States Postal Service for excessive absences, she invoked the arbitration provisions of the collective bargaining contract between the Service and her union. An impartial arbitrator found that her termination was "for just cause" (App. A-38).[1] Petitioner contends that the courts below erred in refusing to review the arbitrator's ruling.

1. On September 17, 1976, the Postal Service sent petitioner a notice of removal for unsatisfactory attendance. This notice informed petitioner of her right, under the 1975 National Agreement between the

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[1] "App." refers to the Appendix of documents bound with the brief filed by the government in the court of appeals.

American Postal Workers Union, AFL-CIO and the Postal Service, to submit a grievance for arbitration (App. A-32 to A-33). After an evidentiary hearing, in which petitioner was represented by the local union president, the arbitrator found that petitioner's termination was "for just cause" (App. A-38) and that "the absentee record was a proper cause for removal" (*id.* at A-36). Although petitioner's absences were caused by illness and had been administratively approved, it was clear that her attendance record was unacceptable (App. A-35 to A-36):

> The Arbitrator finds that the grievant was an abnormally sensitive person who simply was unable to get along with her fellow employees. The record shows and I find that she was an excellent worker. She was, however, despite her length of service, unable to adjust to her work environment.
>
> * * * * *
>
> * * * [A]n employer has the right to expect acceptable levels of attendance from their [*sic*] employees and * * * when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons.

Petitioner then commenced this action in the United States District Court for the Southern District of Florida under 39 U.S.C. 1208(b), which authorizes the district courts to entertain "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees * * *." The district court noted (Pet. App. 20) that Section 1208(b) "effectively mirrors" Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185, and that "cases under § 301 are controlling in [Section

1208(b)] suits. See *Nat'l Assoc. of Letter Carriers* v. *Sombretto*, 449 F. 2d 915 (2nd Cir. 1971) [;] *Am. Postal Workers Union* v. *U.S. Postal Service*, 356 F. Supp. 335 (E.D. Tex [.] 1972)." Relying on cases construing Section 301,[2] the district court found that the arbitrator's award was "final and binding" (Pet. App. 21) and therefore entered summary judgment for the government.

On appeal, petitioner abandoned the claim that the Postal Service had violated the collective bargaining agreement. Instead, she contended, as she does here, that as a "preference eligible" employee, she was entitled to judicial review of the arbitration award. Alternatively, she urged that the arbitrator's decision should be reversed in light of a subsequent change in postal employment policy.

The court of appeals affirmed. The court pointed out (Pet. App. 8-13) that the principles stated in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Haynes* v. *U.S. Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966), are not necessarily applicable in a case such as this, because Section 203 of the LMRA, 29 U.S.C. 173, is not among those provisions applicable to postal workers under the Postal Reorganization Act (see 39 U.S.C. 1209(a)), and Section 203 formed the basis for the "*Hines-Haynes* rationale" (Pet. App. 11). Nonetheless, the court of appeals held that 39 U.S.C. 1005(a)(1)(A), which provides for administrative review of adverse personnel actions "except to the extent of any inconsistency with * * * the provisions of any collective-bargaining agreement * * *," requires the same result that would be reached if the "*Hines-Haynes* rationale" were directly applicable (Pet. App. 12). The court observed that the provisions of the governing collective-bargaining

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[2]See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Haynes* v. *U.S. Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966).

agreement provide for "binding and final" arbitration, that petitioner did not contend that she was inadequately represented by her union during arbitration, that the arbitrator found no contract violation, and that the merits of that decision are not subject to judicial review (*id.* at 12-13). Thus, petitioner failed to show any ground for relief under 39 U.S.C. 1208 (Pet. App. 13).

2. Petitioner asserts that, as a "preference eligible" employee, she is entitled to judicial review of the arbitrator's decision. But, as the court of appeals explained (Pet. App. 16-17; emphasis in original & footnotes omitted):

> * * * The prohibition of [39 U.S.C.] section 1005(a)(2), if it is such, expressly applies only to "a preference eligible (*as that term is defined under* [5 U.S.C.] *section 2108(3)* * * *)," a definition restricted to preference rights given veterans and some members of their families. Neither the pleadings, the evidence, nor any contention in brief indicate that the plaintiff-appellant is within the category of "preference eligible" employees as thus statutorily excepted from relegation to collective-bargaining rather than civil-service disciplinary review rights. Her argument that she is within this statutory exception therefore fails.

The court of appeals expressly rejected (Pet. App. 17 n. 10) petitioner's theory that "preference eligible" status obtains with respect to *every* federal employee who has "completed a probationary or trial period"—an approach that would render the provisions of Section 1005(a)(1)(A) meaningless. Petitioner does not contest this holding; she ignores it.

Moreover, even if petitioner is a "preference eligible" employee, she is not entitled to judicial review of the arbitration award. Had petitioner elected to pursue the administrative remedies available to "preference

eligible" employees (see 39 U.S.C. 1005(a)(1) and (2)), she might have been entitled to judicial review of an adverse administrative decision. But petitioner chose instead to pursue her remedies under the collective-bargaining agreement, including binding arbitration. There is no support for her claim that she is entitled to review of the arbitrator's decision following exhaustion of this separate set of remedies.

3. Petitioner urges that, should this case be adjudicated on its merits, the arbitrator's award should be reviewed in light of a change in Postal Service policy that occurred after the arbitrator's decision. Under the new policy, the Service will not take disciplinary action against an employee based upon administratively-approved sick leave, even if excessive. As the court below properly observed (Pet. App. 17-18), however, this policy change does not suggest that there was a breach of the collective-bargaining contract in petitioner's case, which is a prerequisite to any claim under 39 U.S.C. 1208(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10